NO. 83-1318

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

SAMUEL P. GARRISON, etc.,
Petitioners,

vs.

GEORGE SMITH ALSTON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court grant certiorari to review the standard of effective assistance of counsel applied by the Fourth Circuit when
   (a) there is no longer a conflict among the federal courts as to the correct standard, and
   (b) trial counsel's performance in this case was prejudicially ineffective under any possible standard?
2. Should this Court grant certiorari to review the Fourth Circuit's conclusion that trial counsel's incompetence was not harmless error when petitioner's challenge to that conclusion raises no substantial question of law warranting consideration by this Court?

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OPINION BELOW

Omitted pursuant to Rule 34.2.

JURISDICTION

Omitted pursuant to Rule 34.2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Omitted pursuant to Rule 34.2.

STATEMENT OF THE CASE

On August 19, 1977, Respondent George Alston ("Mr. Alston") was convicted in the Superior Court of Cumberland County, North Carolina, of assault with intent to kill inflicting serious injury, armed robbery and kidnapping. Two earlier trials on the same charges had resulted in mistrials when juries were unable to reach a verdict. Upon his conviction in the third trial, Mr. Alston was sentenced to concurrent life sentences for kidnapping and armed robbery and a consecutive sentence of twenty years for assault. His direct appeal, handled

by the same court-appointed attorney, was denied by the North Carolina Supreme Court on April 17, 1978.

State remedies on the issues now before this Court were exhausted by application for post-conviction relief filed on March 12, 1979 by new attorneys. That application was denied without hearing by the original trial judge on March 16, 1979; the North Carolina Court of Appeals denied certiorari; and the North Carolina Supreme Court affirmed that denial on June 18, 1979.

Mr. Alston filed this habeas action on January 22, 1981, asserting matters raised in the state court application for post-conviction relief. On February 5, 1982, the Honorable John D. Larkins, United States District Judge for the Eastern District of North Carolina, dismissed Mr. Alston's petition for writ of habeas corpus without hearing. Judge Larkin acknowledged that Mr. Alston's trial counsel had rendered ineffective assistance but held that such ineffectiveness was not prejudicial because the jury "was more likely than not to convict [Mr. Alston]" even if counsel's performance had been adequate.

On November 3, 1983 the United States Court of Appeals for the Fourth Circuit reversed Judge Larkins, agreeing that court-appointed trial counsel's performance was constitutionally defective and further holding that the ineffective assistance of counsel was prejudicial. The Fourth Circuit therefore directed that the writ issue on Mr. Alston's behalf.

STATEMENT OF FACTS

The evidence introduced at Mr. Alston's trial is summarized in the Fourth Circuit's opinion. [Appendix to Petition for Certiorari pp. 2-6].

At trial, Detective Burns, one of the arresting officers, testified on direct examination that, after being advised of his constitutional right to remain silent, Mr. Alston "stood on his constitutional rights." The prosecutor then asked "in other words he didn't say anything to you at that time?" The detective answered, "He started to converse, sir and then he just shut up and said I want my lawyer and we abided by his wishes." On cross-examination, Detective Burns testified that Mr. Alston's exercise of his constitutional right to remain silent was one of the reasons he became the primary suspect.

Detective Burns subsequently testified a third time that Mr. Alston had stood on his constitutional right to remain silent following his arrest.

Detective Burns also testified that Mr. Alston's court-appointed attorney had endorsed the quality of a crucial identification line-up:

> He [trial counsel] said that this was the best one he had ever saw - I don't remember whether he said it was the best one he ever saw but he said it was a very good line-up."

Mr. Alston's court-appointed counsel failed to object to any of the foregoing testimony, to ask for curative instructions or to move for mistrial. Nor did he raise the issues on direct appeal.

SUMMARY OF ARGUMENT

The district court and the court of appeals both correctly held that Mr. Alston's court-appointed trial counsel failed to render effective assistance. The court of appeals correctly concluded that this failure was not harmless error. Contrary to petitioner's argument, there is no longer any conflict among the circuits as to the definition of "effective assistance of counsel." In any event, this would not be an appropriate case to resolve such a conflict because Mr. Alston's attorney was "ineffective" under any definition. Counsel's ineffectiveness was clearly prejudicial to Mr. Alston because (1) evidence concerning his post-arrest silence undermined his essential defense of alibi and (2) the evidence that his attorney vouched for the crucial line-up reinforced one of the key elements of the state's case.

ARGUMENT

I. There Is No Conflict Among The Circuits As To The Definition Of Effective Assistance Of Counsel; And This Would Not Be A Suitable Case For Resolution Of Such A Conflict If It Existed.

Although the district court and the court of appeals agree that Mr. Alston's court-appointed attorney was deficient, petitioner nevertheless argues that a grant of certiorari in this case would give the Court an opportunity to resolve a conflict among the circuits as to the proper definition of "effective assistance of counsel." That argument is without merit.

There is no longer any real conflict among the circuits with respect to the definition of effective assistance of counsel. Following this Court's lead in

McMann v. Richardson, 397 U.S. 759, 771, 25 L.Ed.2d 763, 773, 90 S.Ct. 1441, 1444 (1970), every federal court of appeals has now adopted a "reasonable competence" standard. See, e.g., United States v. Bosch, 584 F.2d 1113, 1120-21 (1st. Cir. 1978) ("reasonably competent assistance"); Trapnell v. United States, 725 F.2d 149, 153 (2d. Cir. 1983) ("reasonably competent assistance"); Moore v. United States, 432 F.2d 730, 737 (3d. Cir. 1970) ("normal competency"); Marzullo v. Maryland, 561 F.2d 540, 543-44 (4th Cir. 1977), cert. denied, 435 U.S. 1011, 98 S.Ct. 1885, 56 L.Ed.2d 394 (1978) ("normal competency"); Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974) ("reasonably effective assistance"); United States ex rel. Williams v. Twomey, 510 F.2d 634, 641 (7th Cir.) cert. denied, 423 U.S. 876, 96 S.Ct. 148, 46 L.Ed.2d 109 (1975) ("minimum standard of professional representation"); United States v. Easter, 539 F.2d 663, 666 (8th Cir. 1976) ("customary skills and diligence" of a "reasonably competent attorney"); Cooper v. Fitzharris, 586 F.2d 1325, 1328 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974, 99 S.Ct. 1542, 59 L.Ed.2d 793 (1979) ("reasonably competent and effective" assistance); Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir.) (en banc), cert. denied, 445 U.S. 945, 100 S.Ct. 1342, 63 L.Ed.2d 779 (1980) ("reasonably competent assistance"); Douglas v. Wainwright, 714 F.2d 1532, 1553 (11th Cir. 1983) ("reasonably effective assistance"). In Trapnell v. United States, the Second Circuit became the last of the circuits to abandon the old "farce and mockery" test, thus eliminating the conflict among the circuits upon which petitioner relies. To the extent that some of the circuits have used slightly varying language in stating the "reasonable competence" standard, those differences are ones of semantics rather than substance.

Even if the minor variations reflected a difference in substance, this would not be a suitable case for this Court to clarify the standard. The assistance Mr. Alston received was ineffective under any standard. Whatever might be the outer bounds of the constitutionally mandated range of competence, criminal defense attorneys should at least be expected to know and assert on behalf of their clients those fundamental protections guaranteed criminal defendants by our constitution. See, e.g., Boyer v. Patton, 579 F.2d 284, 288

(3rd. Cir. 1978); People v. Ibarra, 60 Cal.2d 460, 34 Cal. Rptr. 863, 386 P.2d 487 (1963) (Traynor, J.) and cf. Beasley v. United States, 491 F.2d at 695:

> Where the defense is substantially weakened because of the unawareness on the part of defense counsel of a rule of law basic to the case, the accused is not given the effective representation guaranteed him by the Constitution. [quoting Poe v. United States, 233 F.Supp. 173, 178 (D.D.C. 1964), aff'd, 352 F.2d 634 (D.C. Cir. 1965)].

Mr. Alston's court appointed attorney failed to meet this minimum requirement.

In clear violation of this Court's mandate in Doyle v. Ohio, 426 U.S. 610, 49 L.Ed.2d 91, 96 S.Ct. 2240 (1976), evidence of Mr. Alston's post-arrest silence was introduced on not one but three occasions. On one of those occasions the arresting officer specifically testified that Mr. Alston's exercise of his constitutional right was one of four factors which focused police suspicions on him - thus eliminating any doubt that the jury and defense counsel might miss the significance of the improper evidence. As the court of appeals noted, this patently unconstitutional evidence undermined Mr. Alston's central alibi defense. [Appendix to Petition for Certiorari at 9-11]. Because there was no conceivable tactical advantage in letting the evidence in, the failure of Mr. Alston's attorney to object, move to strike, request curative instructions or move for a mistrial must be attributed to ignorance of the fundamental rule of Doyle and its ancestors.

Trial counsel's incompetence was accentuated by his indiscretion in praising the state's crucial line-up and his failure to object to the prosecution's introduction of that praise into evidence. Appointed counsel thus subjected Mr. Alston to a "whip-saw" effect. Evidence that defense counsel approved the critical line-up added weight and credibility to a crucial element of the state's case while, at the same time, improper evidence of his post-arrest silence, which would have been excluded by effective counsel, undermined his primary defense.

In short, this case, unlike those cited by petitioner, is not one in which otherwise effective defense counsel failed to make a "garden variety" or peripheral objection, an objection of questionable validity or significance or

an objection dependent on facts outside the record and possibly unknown to counsel. Mr. Alston's attorney, through apparent ignorance, failed to protect a fundamental constitutional right of the criminally accused; the impropriety of the evidence was evident on its face; and its prejudicial effect went to the heart of Mr. Alston's defense. When this is combined with counsel's endorsement of a key element of the state's case, even the old "farce and mockery" standard is probably satisfied. E.g., People v. Ibarra, 60 Cal.2d at 469-66, 34 Cal. Rptr. at 867, 386 P.2d at 491. A fortiori, Mr. Alston received ineffective assistance under any possible variation of the "reasonable competence" standard now universally accepted by the federal courts.

II. The Fourth Circuit Correctly Concluded That Trial Counsel's Ineffectiveness Was Not Harmless Error; And United States v. Frady, 456 U.S. 152 (1983) Is Not To The Contrary.

Petitioner's secondary argument that the Court of Appeal's determination of prejudice is inconsistent with United States v. Frady, 456 U.S. 152 (1983) also fails to raise a substantial question suitable for consideration by this Court.

As demonstrated above, trial counsel's ineffectiveness in Mr. Alston's case weakened the defense on which he placed primary reliance at trial and reinforced a key element of the prosecution's case. After carefully reviewing the record and applying the standards enunciated by this Court in Chapman v. California, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967) and United States v. Hasting, ___ U.S. ___, 76 L.Ed.2d 96, 103 S.Ct. ___ (1983), the court of appeals correctly found "reason to fear that the shortcomings of counsel infected the outcome of Alston's third trial . . .." Indeed, prejudice to Mr. Alston's defense was obviously the purpose and effect of the prosecution's intentional introduction of evidence as to his post-arrest silence and his attorney's approval of the critical line-up. Thus, there is ample support for the Fourth Circuit's conclusion that counsel's ineffectiveness did not constitute harmless error.

United States v. Frady is not to the contrary. Assuming, arguendo, that Frady's standard of prejudice is applicable in "ineffective assistance" cases, the decision of the court of appeals was consistent with that standard. In

Frady this court held that a trial court's erroneous instruction on "malice" was not prejudicial for two reasons. First, the erroneous instruction related to a defense upon which Frady did not rely at trial. Second, the jury's conclusion that the killing was premeditated a fortiori precluded the possibility of a finding that the killing resulted from "the heat of passion" (i.e. without malice) regardless of what malice instruction was given. Clearly, neither of these grounds is present in this case. Thus, Frady provides no grounds for questioning the Fourth Circuit's conclusion that Mr. Alston suffered prejudice as a result of his counsel's incompetence.

CONCLUSION

For the reason's set forth above, this is not an appropriate case for review by this Court. The decision by the court of appeals was clearly correct; petitioner has raised no substantial question warranting review by this Court; and the Petition for Writ of Certiorari should therefore be denied.

Respectively submitted this the 16th day of April, 1984.

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CERTIFICATE OF SERVICE

This is to certify that two copies of the foregoing Brief in Opposition to Petition for Certiorari were duly served this date on counsel for the Petitioners by forwarding a copy thereof enclosed in a postage paid envelope deposited in the United States Mail and addressed as follows:

Mr. Rufus L. Edmiston
Mr. Richard N. League
1 West Morgan Street
Post Office Box 629
Raleigh, North Carolina 27602

This the 17th day of April, 1984.

Michael T. Medford
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vs.

GEORGE SMITH ALSTON,
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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS
AND TO FILE TYPEWRITTEN BRIEF IN OPPOSITION TO
PETITION FOR CERTIORARI

Respondent George Smith Alston, through undersigned counsel, hereby moves pursuant to Rule 46 of the Rules of this Court and 28 United States Code §1915 for an Order permitting him to proceed in this Court in forma pauperis with his opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit filed in this Court by Petitioner on February 1, 1984 and further permitting him to file his Brief in Opposition to Petition for Certiorari in typewritten form.

In support of this Motion, respondent respectfully shows unto the Court that the United States Court of Appeals for the Fourth Circuit appointed the undersigned Michael T. Medford as counsel for respondent under the Criminal Justice Act of 1964, as amended.

Respondent's Brief in Opposition to Petition for Certiorari is being filed with this Motion.

Respectfully submitted this 16th day of April, 1984.

Howard E. Manning

Michael T. Medford

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CERTIFICATE OF SERVICE

This is to certify that two copies of the foregoing Motion for Leave to Proceed In Forma Pauperis and to File Typewritten Brief in Opposition to Petition for Certiorari were duly served this date on counsel for the Petitioners by forwarding a copy thereof enclosed in a postage paid envelope deposited in the United States Mail and addressed as follows:

Mr. Rufus L. Edmiston
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